IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.506 OF 1990

Babruvahan Bodha Lokare,
aged about 66 years,
Occupation : Agriculturist,
residing at Laul,
Taluka Madha,
District: Solapur ..Appellant
(Original Defendant)

versus

Madhav Bodha Lokare,
aged anout 56 years,
Occupation : Agriculturist,
residing at Laul,
Taluka Madha,
District: Solapure ..Respondent.
(Original Plaintiff)

Shri Rajure for the Appellant

None for the respondent.

Coram : S.R.Sathe, J.
Dated : 29th March, 2006

Oral Judgment.

1. Appellant, the Original Defendant in Regular Civil Suit No.12 of 1981 has preferred this appeal against the judgment and order passed by the Court of Second Additional District Judge, Solapur, in Civil Appeal No.149 of 1987, whereby, the judgment and order passed by the trial Court dismissing the plaintiffs suit for partition and separate possession was set aside and the appeal was allowed and decree for partition and separate possession was

passed in favour of the plaintiff. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:

. The suit land described in para 1 of the plaint which includes agricultural land as well as house property is joint family property of plaintiff and his brother i.e. defendant. The property described in para 1, 3 and 4 of the plaint is in possession of the tenants. Sometime in the year 1980 the plaintiff found that the defendant had started raising loan against the joint family property and it had become difficult to cultivate the property jointly. The plaintiff therefore issued notice to defendant and called upon him to effect partition and separate possession of the joint family property. The defendant gave reply to the said notice and contended that the property is already partitioned about 20 to 25 years back. The plaintiff, therefore, filed suit for partition and separate possession against his brother i.e. defendant.

3. The defendant filed his written statement and opposed the suit claim. He contended that their property has already been partitioned about 20 years back and as per the said partition land bearing block No.732 was given to him while the other land bearing block No.725, 583 and 585 were given to plaintiff. He, further, contended that after spending about Rs.15,000/- to Rs.20,000/- he has made improvement in the land bearing Block No.732 and with a view to take advantage of the same the plaintiff has filed a false suit. He also contended that the tenants in the other land are necessary parties to the present suit. Hence, on these grounds he prayed for dismissal of the suit.

4. On these pleadings, the learned trial Judge framed issues at Exhibit 10.

5. As the defendant had taken the contention that the suit property is already partitioned, burden was upon him to prove his case. The defendant examined himself at exhibit 34 and one other witness by name Shriram Mohite at exhibit 48. As against this the plaintiff examined himself and produced certain documents. After considering the evidence adduced by both the parties, the learned

trial Judge came to the conclusion that the defendant has proved that the partition has taken place about 20 to 25 years back as contended by him. He, therefore, dismissed the plaintiffs suit.

6. Being aggrieved by the said judgment and order the plaintiff filed Civil Appeal No.149 of 1987. After considering the arguments advanced by both the learned Advocates the first appellate court came to the conclusion that the defendant has failed to prove the case of previous partition and the plaintiff is entitled for partition and separate possession. He, therefore, allowed the appeal and decreed the plaintiffs suit for partition and separate possession in his favour.

7. The above mentioned order of the first appellate court is challenged by the defendant in the present second appeal. From the perusal of the record it appears that while admitting the said appeal, this Court (Coram:A.B.Sawant, J.) has passed the following order:

> "Admit, on the ground Nos.5, 6 and 7 which are substantial question of law".

The said grounds are as under :

> "5. It is also an error to hold that the admission given by the plaintiff in criminal case is the stray admission therefore it cannot be relied upon.
>
> 6. The learned Judge erred in holding that there was no documentary evidence to prove the alleged oral partition and the documents on record negatives the case of the defendant.
>
> 7. It ought to have been considered that oral partition is not barred under the provisions of Hindu Law."

8. On the date of hearing the respondents were absent, though they were duly served with Court Service Notice. Hence, I heard the learned Advocate for the Appellant.

9. Shri Rajure, learned Advocate for the defendant has urged only two points before me. Firstly, he submitted that the learned Additional District Judge has not properly appreciated the

evidence on record and has wrongly held that the defendant has failed to prove the case of previous partition. Secondly, he canvassed before me that the First Appellate Court ought to have considered the fact that the plaintiff had admitted in previous criminal case that partition has taken place between he and his brother. He, therefore, submitted that the appeal be allowed and the plaintiffs suit be dismissed.

10. It is an admitted fact that the suit property was a joint family property of plaintiff and defendant. Admittedly, initially the suit property was standing in the name of their father Bodha Lokare. It is the case of the defendant that the partition of the said joint family property took place about 20 to 25 years back and they also started residing separately since then. Naturally, the burden was on the defendant to prove his case with regard to previous partition.

11. The defendant has stated in his deposition Exhibit 34 that partition took place between plaintiff and him about 20 to 25 years back and at that time the land bearing block No.732 was allotted to his share while the other three lands were

allotted to the share of plaintiff. He has also stated that thereafter he made improvements in the said land and for that purpose spent about Rs.15,000/- to 20,000/-. According to him the said partition took place in presence of their father and other two witnesses namely Shriram Mohite and Maruti Mhaske. He has also examined witness Shriram Mohite at Exhibit 48. The said witness has supported the case of the defendant.

12. According to plaintiff the suit lands were cultivated by plaintiff and defendant separately. For the sake of convenience half of the land was being cultivated by the plaintiff and the remaining half by the defendant. However, actual partition by metes and bounds in respect of entire joint family property had not taken place. So, under such circumstances, we have to scan the entire evidence on record and find out as to whose version appears to be true and correct.

13. Firstly, it must be noted that according to defendant the partition had taken place in presence of his father as well as other two witnesses and plaintiff. If really the partition as suggested by the defendant had taken place then normally the

parties would have prepared some document of partition. Particularly, when only one block number was allotted to defendant and other three blocks were given to the share of plaintiff and no share was at all given to father. It is pertinent to note that if really partition had taken place as suggested by the defendant then certainly both these brothers would have made some arrangement regarding their father who was in fact present at the time of partition. Besides this, it is common experience that when such partition takes place then invariably the parties atleast move the revenue authorities for carrying out necessary change in the record of rights. However, in the instant case we find that no such application was moved by the defendant or his father to make necessary changes in the record of rights as per the alleged partition. This, in my opinion, is very important circumstance which negatives the case of the defendant.

14. It is pertinent to note that even till today the Khata has not been divided. If really partition had taken place then there would have been a separate Khata of plaintiff and defendant and they would have paid separate assessment for the same. But, as it is, we do not find any such evidence. On

the contrary, we find that the defendant has paid revenue assessment even in respect of the land which is standing in the name of plaintiff and vice versa. So, this infact shows that the property continued to be joint but only for the sake of convenience they were cultivating seperate portions of the land. If, we see the 7 x 12 extract of the lands in question then also it is very clear that the names of plaintiff and defendant are entered as holders and both of them are shown to be the owners to the extent of 8 anna share. So, merely because the defendant witness has stated that he was present at the time of partition and partition has taken place as contended by the defendant, I am not inclined to accept the said evidence. The learned First Appellate Court has also rightly rejected the said evidence as the same was not at all corroborated by any documentary evidence.

15. Much is made about the fact that the present plaintiff had filed one criminal case against his brother i.e. defendant. It was bearing C.C.No.86 of 1980 and in that case, in his deposition he had said "We are residing separately since last 20 to 25 years and partition also took place in respect of the said lands, khata is joint. The partition is

oral and our names are not entered to the 7 x 12 extract as per the partition. It is not true to suggest that Gut No 732 has gone to the share of accused (present defendant) and Gut No.735 to him..... I got half share from the southern side and the accused from the northern half share. There was jawar crop in my land at the time of incident and there was also jawar in the land of the accused." His wife has stated "accused and complainant (defendant and plaintiff) were residing separately. There is no partition of land. We have half and accused from the southern side." Relying on the above statement, the learned Advocate for the defendant strenuously argued before me that in this previous judicial proceeding the plaintiff has clearly admitted that the partition has already taken place and as such it must be held that the contention of the defendant is proved by him. However, while considering this statement we have to read the entire evidence. It seems that according to plaintiff they are cultivating the lands separately. So, from that angle only he has said that the partition has taken place. It was not at all his intention to indicate that the partition of the entire joint family property has taken place. Had it been so, he would not have denied that the

land bearing Block No.732 has been allotted to the share of the defendant. So, merely because there is some such stray sentence we cant jump to the conclusion that the partition has already taken place about 20 to 25 years back, particularly, when we find that even during these 20 to 25 years at no point of time the defendant has made any attempt to get the land bearing block No.732 entered only in his name.

16. Though the defendant has contended that he has spent Rs.15,000/- to Rs.20,000/- for improvement in the land, he has not adduced any evidence worth the name to prove his contention in that behalf. He could nave examined any witness through whom he carried out the improvement and to whom he made the payment. But that has not happened. He has also not produced any receipt to show as to how much amount has been spent by him and for what purpose. Besides this, if really he had spent such huge amount in respect of the land which was according to him allotted to his exclusive share then certainly he would have made the efforts to get his name only entered in the record of rights of the said land and would have moved the concerned authorities to delete the name of plaintiff from the 7 x 12 extract of the

said land, but that has also not happened. So, considering all this evidence and having regard to the preponderance of probabilities, the first appellate judge has rightly held that there is no cogent and convincing evidence to prove the case of defendant regarding previous partition. He, therefore, rightly decreed the suit for partition and separate possession.

. In this view of the matter there is no substance in this appeal. Appeal is dismissed.

. Under the circumstances of the case, parties to bear their own cost.

(S.R.Sathe, J.)